



INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
IVY TECH COMMUNITY COLLEGE,
LAFAYETTE

VICTOR VEGA TORRES v. STATE OF INDIANA

Appeal from:
Lake Superior Court
The Honorable Kathleen
Sullivan, Judge Pro Tem

Oral Argument:
Tuesday, April 8, 2008
10:00—10:40 a.m.
20 minutes each side

CRIMINAL LAW

Is Mr. Torres' **statutory maximum sentence** of eight years following a guilty plea to child molesting inappropriate in light of the nature of the offense and his character, including his history of mental illness?

Facts and Procedural History

At some point between August 1, 2004, and July 1, 2005, B.D., who was either five or six years old, spent the night at his grandfather's home in East Chicago. Torres also spent the night there. According to the **probable cause affidavit**, on one occasion that night B.D. refused Torres's request that B.D. "get close to him." Later that evening, B.D. went to sleep on a couch in the living room wearing a t-shirt and blue jeans. Some time later, B.D. awoke in the nude to find Torres sucking on his "private area." When Torres realized B.D. was awake, he ceased and helped B.D. put his clothes back on. B.D. reported these events to his mother, who in turn filed a police report on April 14, 2006.

On September 20, 2006, the State

charged Torres with child molesting as a Class A **felony** and child molesting as a Class C felony. On May 24, 2007, the parties entered into a plea agreement under which Torres agreed to plead guilty to child molesting as a Class C felony and the State agreed to dismiss the charge of child molesting as a Class A felony. Sentencing was left to the trial court's discretion, and the parties stipulated to a **factual basis** that differed slightly from the probable cause affidavit. Specifically, the stipulated factual basis omitted that Torres sucked on B.D.'s "private area," and stated instead that Torres fondled B.D.'s penis "with the intent to arouse or satisfy his own sexual desires or those of the victim," thus reducing the offense to a Class C felony.

The trial court accepted Torres's guilty plea and conducted a sentencing

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hearing, at which the trial court received documentary evidence that included Torres's mental health records and heard testimony from B.D.'s mother and from Torres. On the same day, the trial court entered an order finding that Torres's guilty plea, history of mental illness, and status as a victim of child abuse were **mitigating circumstances** and that Torres's criminal history, which included two convictions of criminal recklessness as Class A **misdemeanors**, and B.D.'s age were **aggravating circumstances**. The trial court also found that either aggravating circumstance, standing alone, outweighed the mitigating circumstances. Based on these findings, the trial court sentenced Torres to the statutory maximum sentence of eight years. The trial court also ordered that the eight-year sentence consist of six years **executed** and two years **suspended to probation**. Torres now appeals.

Parties' Arguments

Indiana appellate courts are authorized to revise a defendant's sentence if, after due consideration of the trial court's decision, the appellate court is convinced that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Thus, the parties' arguments focus on various aspects of the nature of the offense and Torres's character:

I. Nature of the Offense

A. Victim's Age

The State argues that B.D.'s age (he was five or six years old at the time of the offense) renders the nature of the offense more egregious than is typical. Child molesting as a Class C felony requires as an **element of the offense**

that the victim be under fourteen years of age, but trial courts may consider the victim's age as an aggravating circumstance if the victim's age is substantially less than the age required to establish the element. Torres counters that although B.D.'s age is less than the age required to establish the element of the offense, it is not substantially less. Torres also argues that B.D.'s age does not justify the statutory maximum sentence.

II. Character of the Offender

A. Guilty Plea

Torres argues that his guilty plea comments favorably on his character. A guilty plea generally comments favorably on a defendant's character unless he received a substantial benefit from the plea or the evidence against him is so substantial that the decision to plead guilty is a pragmatic one. The State does not appear to argue that the evidence against Torres is substantial, but does argue that Torres received a substantial benefit from his plea. Specifically, the State points out that in exchange for Torres's guilty plea, the State agreed to dismiss the charge of child molesting as a Class A felony, which carries a sentence of twenty to fifty years.

B. History of Mental Illness

Torres argues that his history of mental illness comments favorably on his character. In Indiana, the mitigating weight assigned to a defendant's mental illness is determined by examining four factors:

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(1) the extent of the defendant's inability to control his behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime. The State appears to acknowledge that Torres has had a history of mental illnesses dating back to at least 1985 or 1986, but contends there is no evidence suggesting that these illnesses make Torres unable to control his behavior, significantly limit his functioning, or influenced his decision to molest B.D.



C. Criminal History

The State argues Torres's criminal history, specifically his two convictions of criminal recklessness as Class A misdemeanors that occurred in March 2001 and September 2006, comments negatively on his character. In Indiana, the significance of a defendant's prior criminal history in the context of sentencing is analyzed based on the gravity, nature, and number of prior offenses as they relate to the current offense. For example, if a defendant being sentenced for the current offense of robbery also has three prior convictions for robbery, the prior convictions will comment more unfavorably on the defendant's character than if he had only one prior conviction for public intoxication. Torres argues that his prior convictions more closely resemble the latter example and therefore should not comment as negatively on his character as the State urges.

GLOSSARY OF TERMS

Advisory Sentence: Under Indiana's sentencing scheme, a trial court is given a sentencing range for each crime of which a defendant is convicted. An advisory sentence is a recommended, or advised, sentence within that range.

Aggravating Circumstance: A fact that may warrant a sentence above the advisory. Examples of aggravating circumstances include that the victim of the offense was mentally or physically infirm and that the defendant committed the offense while on probation.

Element of the Offense: Part of an offense the State is required to prove to convict the defendant. Thus, if an offense has four elements, the State must prove all four beyond a reasonable doubt to obtain a conviction.

Executed Sentence: The portion of a sentence the defendant actually serves in prison, assuming the defendant does not receive credit time for good behavior. A defendant receiving credit time may actually serve only half of an executed sentence.

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GLOSSARY OF TERMS

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Factual Basis: A judicial finding that there is sufficient evidence the person pleading guilty actually committed the crime. In order to accept a defendant's guilty plea, the trial court must find that a factual basis exists. Typically, the defendant describes his commission of the offense in open court or, as was done in this case, the State and the defendant submit a document describing when, where, and how the offense was committed.

Felony: A serious offense. Felonies are divided into four Classes, with Class D felonies being the least serious and Class A felonies being the most serious, except for murder, which is classified separately. In Indiana, a sentence for a Class A felony ranges from twenty to fifty years, with an advisory sentence of thirty years, and a sentence for a Class C felony ranges from two to eight years, with an advisory sentence of four years.

Misdemeanor: An offense considered less serious than a felony. The most serious misdemeanors are Class A misdemeanors, for which a trial court may sentence a defendant to up to one year in prison.

Mitigating Circumstance: A fact that may warrant a sentence below the advisory. Examples of mitigating circumstances include the defendant's lack of criminal history and that the defendant's imprisonment will result in hardship to the defendant's dependents.

Probable Cause Affidavit: A sworn statement submitted to a judge by a law enforcement officer stating the reasons why the officer believes a crime has been committed and requesting permission to arrest the person the officer believes has committed the crime.

Probation: A period of time during which a defendant convicted of an offense is not imprisoned, but must comply with various conditions. A trial court may order a defendant to serve a probationary term after release from imprisonment or as a substitute for imprisonment. If a defendant violates probation, the trial court may order the defendant to serve the previously suspended portion of his sentence in prison.

Statutory Maximum Sentence: The maximum amount of time that a defendant may serve for a particular offense.

Suspended Sentence: The portion of a sentence that the defendant does not serve. A trial court generally orders that a defendant be placed on probation for the suspended portion of a sentence, as was the case here.

TODAY'S PANEL OF JUDGES

Hon. Ezra H. Friedlander (Hamilton County), Presiding

- Judge of the Court of Appeals since January 1993

Ezra H. Friedlander was appointed to the Court of Appeals by Governor Evan Bayh in January 1993. A native of New Jersey, Judge Friedlander graduated from Indiana University in 1962 with a BA in History and Government. He earned his law degree from Indiana University School of Law in 1965.

Judge Friedlander practiced law for 27 years before being appointed to the bench. His practice was primarily in the area of civil law, but he also served as a deputy prosecutor in Lake and Marion counties and as corporate counsel to the Secretary of State's Office.

Judge Friedlander is chair of the Indiana Supreme Court's Commission on Race and Gender Fairness. He is a member of the Indiana State and American bar associations; American Judicature Society; the Indiana Judges Association; and the Indiana Court of Appeals External Relations Committee. He is a graduate of New York University's Appellate Judges Institute of Judicial Administration. Judge Friedlander is a past member of the Board of Managers of the Indiana State Bar Association and past chair of its Young Lawyers Section. He is also a Fellow of the Indiana State Bar Foundation. He

has previously been active in the American Bar Association's Judicial Division as well as many other areas of the bar, including the Indianapolis Bar Association and the Indianapolis Bar Foundation.

Judge Friedlander stays actively involved at his alma mater by serving on the Dean's Advisory Board of the College of Arts and Sciences, including as chairman of the Committee on Directors. He also serves on the Board of Directors of the Indiana University Foundation, chairs its Committee on Directors, and is a member of the Foundation's Executive Committee. Judge Friedlander was honored by the IU School of Law as a member of its Academy of Law Alumni Fellows.

Judge Friedlander also remains actively involved in Hamilton County community efforts. He was a member of the local organizing committee for the 2005 Solheim Cup; the 2002 World Basketball Championships; and is a founder of the Carmel Youth Soccer Association.

Judge Friedlander, who was retained on the Court of Appeals by election in 1996 and 2006, is married and has three children.

"Appeals on Wheels"

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

**This is the
Court of
Appeals'
206th case
"on the road"
since early
2000.**

**Sites for
traveling oral
arguments
are often law
schools,
colleges,
high schools,
and county
courthouses.**

TODAY'S PANEL OF JUDGES

Hon. Margret G. Robb (Tippecanoe County)

- Judge of the Court of Appeals since July 1998

Margret G. Robb was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis.

Prior to joining the Court, Judge Robb was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender. She chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana; and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an officer for the Indiana State Bar Association, Indiana Bar Foundation, Tippecanoe County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges. Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YWCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was re-elected on the Court of Appeals by election in 2000, is married to a professor at Purdue. Their son, a graduate of the United States Naval Academy, is on active duty in the United States Navy.

The 15 judges of the Indiana Court of Appeals issue more than 2,800 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.



TODAY'S PANEL OF JUDGES

Hon. Cale J. Bradford (Marion County)

- Judge of the Court of Appeals since August 2007



Cale J. Bradford was appointed to the Court of Appeals by Governor Mitch Daniels and took his seat on August 1, 2007.

Prior to his elevation to the Court of Appeals, Judge Bradford served for more than 10 years as Judge of the Marion Superior Court, seven years in the criminal division and three in the civil division. He was twice elected presiding judge by his colleagues.

During this tenure, Judge Bradford chaired the Marion County Criminal Justice Planning Council, a group of local elected and appointed officials who recommended ways to improve the county's response to criminal justice problems, including jail overcrowding, staffing, and budget issues. His efforts led to the end of 30 years of federal oversight of the Marion County Jail and to security improvements at the county's Juvenile Detention Center.

Before joining the bench, Judge Bradford served in the Marion County Prosecutor's Office for two years, overseeing a staff of more than 100 attorneys. For five years, he was an Assistant United States Attorney for the Southern District of Indiana, prosecuting major felony drug trafficking cases. He engaged in the private practice of law from 1986 to 1991, and served as both a deputy prosecutor and public defender during his career.

A native of Indianapolis, Judge Bradford received a B.A. in labor relations and personnel management from Indiana University-Bloomington in 1982 and his J.D. from Indiana University-Indianapolis in 1986. He is the Court of Appeals' liaison to the Indiana Judges Criminal Instructions Committee, which provides guidance to judges on jury instructions in criminal cases, and a former member of both the Indiana Judges Criminal Policy Committee and the Board of Directors of the Indiana State Judicial Conference. He is a Distinguished Fellow of the Indianapolis Bar Association and has taught ICLEF seminars on trial practice for more than 10 years. From 2005 to 2007, Judge Bradford hosted "Off the Bench with Judge Cale Bradford," a legal commentary program on Marion County's government access network. He also served on the Judicial Technology and Automation Committee (JTAC), helping to draft the state judiciary's policies on technology and electronic case management.

Judge Bradford is a former director of Indianapolis's John P. Craine House, a residential alternative to incarceration for women offenders with pre-school-aged children. He is a member of the Lawrence Youth Football League Advisory Board of Directors and the Lawrence Men's Soccer Booster Club. He and his wife, a full-day kindergarten teacher, have five children.

ATTORNEYS FOR THE PARTIES

For Appellant, Victor Vega Torres:

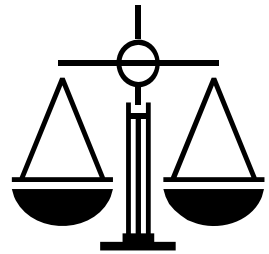
Thomas Vanes
Lake County Public Defender
Merrillville

Thomas Vanes is a lifelong Lake County resident who currently resides in Lowell. He obtained a law degree from Indiana University in 1975 after an undergraduate degree from Notre Dame. His practice over more than 30 years has been almost exclusively in criminal law. Mr. Vanes was a prosecutor from 1976 to 1989; since 1989, he has performed criminal defense work.

Mr. Vanes maintains a private law office in Merrillville, works as a part-time public defender for Lake County, and is a part-time judge, the town judge for Lowell. Over the years, he has done quite a bit of

death penalty work, seeking the death penalty against 13 individuals as a prosecutor and defending seven capital cases since becoming a defense attorney.

In a career filled with public interaction, Mr. Vanes enjoys the more solitary after-hours hobbies of landscaping and hiking, particularly in the western United States. He and his wife have summited California's Mt. Whitney, the highest peak in the lower 48 states, on two occasions. "We hope to do so one more time while age still permits," he says.



For Appellee, State of Indiana:

Arturo Rodriguez II
Deputy Attorney General
Indianapolis

Arturo Rodriguez II was born in Corpus Christi, Texas. In 2002, he graduated from DePaul University in Chicago with a B.A. in Communications. While at DePaul, he was a collegiate cheerleader. In 2006, Mr. Rodriguez graduated from Thomas M. Cooley Law School in Lansing, Michigan. While in law school, he interned at Dykema Gossett, PLLC where he assisted in maintaining an Indian Law website and writing an Energy Law newsletter.

Following law school Mr. Rodriguez moved to Indianapolis and was admitted to the Indiana Bar in 2007. Currently, he is a Deputy Attorney General in the criminal appeals division of the Office of the Indiana Attorney General. As a Deputy Attorney General, he represents the State of Indiana in non-capital cases. His hobbies include traveling and playing sports.